

STATE OF MINNESOTA
DEPARTMENT OF COMMERCE

In the Matter of the Proposed
Adoption of Rules Relating to
Petroleum Tank Release
Compensation Board

STATEMENT OF NEED
AND REASONABLENESS

Background

Chapter 389, Laws of Minnesota 1987 created Chapter 115C of Minnesota Statutes, commonly known as the Petroleum Tank Release Clean-up Act. The purpose of the act was to create a mechanism to take corrective action in regard to petroleum tank releases and to provide for a means of compensation for the cost of the corrective action. Chapter 389 created the Petroleum Tank Release Compensation Board to administer the Petroleum Tank Release Clean-up Fund which will be the source of funds to pay the corrective action costs. The clean-up fund is to be capitalized from a Petroleum Tank Release Clean-up fee assessed against owners of petroleum product tanks.

The Act specifically limits the manner in which the funds can be spent to the following:

1. Administration costs of the clean-up program
2. Agency administrative costs and costs of corrective actions taken by the agency
3. The cost of recovering expenses of corrective actions and training, certification and rulemaking.

The primary expenditure will be for reimbursement for corrective actions taken. The basis upon which persons are eligible for reimbursement and the amount of the reimbursement are specified in the act. Accordingly a substantial amount of the more substantive provisions regarding administration of the program are specified in the statute. However the statute does mandate that rules be adopted regarding the practices and procedures for applications for compensation, investigation of claims as well as specifying the costs that are eligible for reimbursement.

In addition to the matters specified in the Act, the board also determined that it would be appropriate for the rules to deal with procedural and structural matters pertaining to the operation of the board. Accordingly rules are proposed for that purpose and for the purposes specified in the statute.

Rules

2890.0010 Definitions

The definitions found in this part repeat the statutory definitions. They are repeated for the sake of convenience, particularly for applicants who will be referring only to these rules when dealing with the board. This removes the necessity of having both the statute and the rules available when preparing an application or when dealing with the board.

2890.0020 Board Meetings

Subp. 1. Regular Meetings

This subpart establishes a framework for holding regular meetings of the board that allows appropriate flexibility due to the unpredictable nature of the board's workload. It will be difficult to predict the number of applications for reimbursement that will be received in any given time period and the flow of applications will likely be erratic. Therefore, setting a minimum number of yearly meetings and allowing cancellation of meetings due to insufficient business are practical and reasonable provisions.

Subp. 2. Special Meetings

The unpredictable and erratic workload discussed above also necessitates what is in any case a customary ability of boards to call special meetings if such meetings are necessary to discharge the boards obligations.

Subp. 3. Vice-Chair

Although a board of this nature and size does not require the election of officers, provision must be made for the powers of the chair to be passed in the event of the chair's absence so that the board's business may be conducted.

2890.0040 Conduct of Meetings

This section establishes the procedures which ensure that meetings are conducted in an orderly manner and that the business is dealt with in an orderly manner and that the proceedings are properly documented.

2890.0050 Conflict of Interest

The composition of the board as defined by statute increases the likelihood that a conflict of interest may arise. This part recognizes that possibility and ensures that the conflict will not taint a board decision and will not hamper the board during the course of a meeting. Board members and the public know what is to be done where there is a conflict.

2890.0060 Reimbursement of Costs

Subp. 1. Generally and Subp. 2. Conditions of Reimbursement

These subparts simply repeat the requirements for reimbursement established by statute.

Subp. 3. Multiple Responsible Persons

The act states that any responsible person who has incurred eligible costs and meets the statutory conditions for reimbursement is eligible to apply. No specific provision is made for handling situations in which there will be multiple responsible persons but only one tank or corrective action site involved. This subpart clarifies that in those circumstances each responsible person must apply separately even if there is only one tank or corrective action site involved.

2890.0070 Eligible Costs

The statute requires that the board's rules specify the costs that are eligible for reimbursement. This part establishes six general categories (A-F) of eligible costs which coincide with the various phases typically involved in a clean-up operation. Within each general category, some specific illustrative costs are listed. It is not feasible at this time to establish an exhaustive list of specific eligible costs. Instead the general categories and illustrations establish the types of costs which will be eligible for reimbursement. The categories and costs listed were developed in cooperation with the Pollution Control Agency and are based on the agency's past experience as well as the proposed rules for the Federal Leaking Underground Storage Tank Trust Fund. The framework established in this section allows the board some flexibility while being specific enough to give potential applicants a clear picture of the type of costs which are reimbursable.

The legislation's intent was to defray costs for individuals who take responsible appropriate actions in the event of a leak. The intent was not, however, to enable responsible persons or their contractors to profit from the program. For that reason it is the responsibility of the person claiming reimbursement to establish the reasonableness of the costs rather than the board's responsibility to prove that a cost is unreasonable. If the burden were placed on the board substantial extra staffing and expenditure of funds would be necessary to assure that the monies which are being assessed against petroleum tanks were not inappropriately spent. By having the applicant required to prove their case is a more prudent and judicious use of the funds and more adequately carries out the purpose of the legislation.

2890.0080 Ineligible Costs

The purpose of this part is to rule out the use of fund monies to accomplish capital improvements rather than corrective actions at a leak site. As explained above, it is not feasible to attempt to enumerate each and every eligible cost. However, further clarification of eligible costs is accomplished in this section by identifying certain ineligible costs. It is believed that the illustrations used in this part and the previous part will adequately put any applicant on notice as to those items which are either clearly ineligible or which should at least be considered potentially ineligible.

2890.0090 Application Process

This part is also mandated in Chapter 115C which requires the board to adopt rules regarding "the form and procedures for application..."

Subp. 1. Applications

The requirements for the application form are established in this subpart. The form gives the board the basic information it needs to begin its evaluation while recognizing that additional information may be required by the specific characteristics of each release. The application questions listed will extract the minimal information needed from each applicant to begin the reimbursement review process. The information requested identifies who is making the application, the site of the release, the corrective action plan and the commissioner's approval of that plan as well as what is more basic to the entire process; the list of the corrective actions, the eligible costs and the name of the engineering contractor or subcontractor who perform the action. This is the hard core of data that it will be necessary for the board to have to begin its review process.

Subp. 2. Time of Application

It was felt to be important that some time frame for processing applications be established in the rules so that both the applicant and the board would know what the expectations of each were. The thirty day time frame for review established in this subpart strikes a balance between the needs of the board and the needs of the applicant. A shorter period of time would jeopardize the board's ability to thoroughly review the complex claims while a longer waiting period could be unfair to the applicant. In addition, as stated in Subp. 6 below, the Commissioner of the Pollution Control Agency has 15 days following the receipt of a complete application to file a corresponding report with the board's office, thereby shortening the time period for board and staff review of the complete written record.

It is likely that some applicants will be faced with financial deadlines relating to short-term loans taken out to clean up a release. In order to accommodate the financial needs of these applicants, a provision for waiving the 30-day requirement in cases of financial hardship is also included.

Subp. 3. Subsequent Applications

Responsible persons may meet the conditions for reimbursement set forth in part 2890.0060 Subp. 2 after having incurred the majority of the expenses related to clean-up of a release but with the potential for incurring some additional or ongoing eligible costs.

This subpart enable a person in that situation to make application more than once. Items A and B set forth the conditions which must be met in order for subsequent applications to be considered after an applicant has made an initial application and received partial reimbursement. The first condition ensures that the applicant did not receive the statutory maximum reimbursement following the original application. The second condition prevents someone from submitting costs related to new releases that may not have been properly reported. The section also guards against the possibility that multiple applications will create an avenue for avoiding the statutory maximum reimbursement.

Subp. 4. Signatures and Subp. 5 Certification

The purpose of these two subparts are to ensure than an authorized person signs the application and takes responsibility for the information contained therein. Clean-up operations may involve numerous contractors and subcontractors as well as a variety of persons employed by the responsible person. The certification language in particular calls for a high degree of accountability on the part of the responsible person for all information submitted.

Subp. 6. Report of the Commissioner

The act lists several determinations that are to be made by the board based on information provided by the Pollution Control Agency. Time limits for the commissioner to act are not specified in the legislation. Because the applicants may have financial difficulties if expeditious review of their applications does not occur it was deemed important to set time limits and clarify the procedure for the action by the Pollution Control Agency. This section sets the procedure for the submission of that information. The commissioner is allowed 15 days following notification to submit the information in written form. The time restraint is necessary in view of the 30 day time frame the board has to work with in reviewing the applications. This section also clarifies the Pollution Control Agency's obligation to provide adequate information to allow the board to conduct a timely review of claims.

2890.0100 Review and Determination

Subp. 1. Review and Subp. 2. Staff Recommendation

Because the board will not convene to meet each time an application is submitted but will rather, except in extraordinary circumstances, meet at regularly scheduled times and review the applications then pending it was deemed appropriate to make sure that the applications that board will be reviewing are as full and complete as possible. Accordingly it was felt that it should be clear that the board staff has the authority to make preliminary determinations regarding the completeness of each application so that additional information or whatever other action is necessary can be taken by the staff prior to the board meeting to ensure that the applications to be reviewed by the board are as complete as possible at the time of the meeting. This provision enables the staff to assemble all information and documentation relevant to an application thereby providing board members with a complete record of each claim. Without this provision, board members would face a situation where information relevant to a claim may filter in erratically making timely and proper review difficult.

Subp. 3. Board Determination

The entire application process is intended to gather all information pertaining to a leak that is necessary for the board's determination. Minnesota Statutes § 115C.09 subd. 3 requires that a reimbursement can only be made if the costs are actually incurred and are reasonable. The fact that costs were actually incurred should have been with the application documented. This subpart requires that the board's determination be based upon the written record since for the most part what is involved in the application process is a determination of what corrective actions were taken, what was the cost of those corrective actions, were those costs reasonable as well as whether or not those costs are eligible, it is expected that there will be little if any necessity for oral presentations. However, since that is always a possibility, provision is made for oral presentations within a reasonable time frame. The board would like to encourage as much as possible that submissions be in writing because most of the matters to be dealt with are technical in nature or a written submission provide time for the board and staff to give a fair and accurate review prior to a meeting. Oral presentation may result in the board needing to go back to the staff or other persons to consider that oral presentation and may delay an applicant's claim. However the board feels it is extremely important to make sure that no one feel foreclosed from fully presenting their case. Accordingly while oral presentations may not be the best method for the applicant to follow, it is specifically permitted so that the applicant may as fully as possible present their case.

The last paragraph of this subpart sets a requirement which it would be hoped all boards would follow but which it was felt important enough to specify in a rule, that the board promptly notify each applicant of its decision.

2890.0110 Right of Appeal

While it is presumed that there is a right of appeal from a decision of the board, the act did not state the specific procedural basis for the right. To avoid any confusion, this part clarifies that point.

2890.0120 Funding MPCA Actions

This part provides the mechanism by which the Minnesota Pollution Control Agency may apply to the board for additional funds if all other state and federal funds have been exhausted. The right of the agency to request additional funds is established in statute. This mechanism requires the agency to document the use of the original appropriations and to give a specific estimate of future agency costs. This allows the board to carry out its charge of properly administering fund monies. The provisions of this section make sure that the board has enough information to adequately assure that the funds were expended in an appropriate manner and for appropriate purposes.

Small Business Consideration

Minnesota Statutes § 14.115 requires that the impact of the rules upon small businesses be considered in regard to any rulemaking procedure. In the present instance the rules have two functions, one is to determine how the board structurally is organized and operates. In that respect these rules would have no impact upon small business. The only impact upon a small business would come in respect to a small business being an applicant for reimbursement. The board considered the provisions of subpart 2 in regard to those small businesses and determined that because the nature of the rules was to assure that there was adequate documentation to show that small businesses incurred the costs in the manner the statute requires and met the statutory requirements for reimbursement that there could be no distinction between small businesses and other businesses as to the levels of proof that would be required. To have some lesser standard for a small business in the present instance would potentially defeat the purpose of assuring that the funds were expended for the appropriate reason.

In regard to subpart 2 (a) the establishment of less stringent compliance and reporting requirements for small businesses would be inapplicable in this particular situation since the only reporting or compliance requirements pertain to when a business files an application and not anything that the business has to do. These are not compliance or reporting requirements in the usual

sense but as previously discussed set the minimum documentation needed for reimbursement.

As to the establishment of less stringent schedules or deadlines for compliance or reporting requirements, once again since this is a reimbursement procedure, this particular provision would not be applicable to the process. If anything a small business might want to accelerate the time periods to enable it to recover its money as quickly as possible. The rules do provide for waiver of the time periods.

As to the consolidation or simplification of compliance or reporting requirements for small businesses if the application process and the documentation of claims could be construed to be compliance or reporting requirements which the board does not feel is the case, it would be inappropriate in this instance to allow small businesses to produce less documentation for reimbursement of the monies than large businesses. The purpose of the board in the administration of the fund is to assure that the funds are expended for the appropriate reasons and that there is an adequate showing that this has occurred. There can be no lower standard for small businesses.

As to the establishment of performance standards to replace design or operational standards there are no such standards in the rule and this particular provision is not applicable.

Exemption of small businesses would not be appropriate in this instance because once again the entire procedure is set up to make sure that expenses are incurred for an appropriate purpose and they are properly reimbursable. The level of proof is the same for everybody. Therefore it is difficult to see in any way that small businesses could be exempted from these provisions and still carry out the statutory requirement of assuring the appropriate use of these funds as statute requires.

Also it is presumed that many if not most of the applicants will likely be small businesses so that the primary impact of these rules will be on small businesses. Accordingly when the rules were being drafted one of the considerations that was involved was not creating so many requirements and documentation demands as to overload an individual or a small business who would seek reimbursement while at the same time assuring that there was adequate documentation to discharge the board's responsibility to make sure that these funds were not disbursed in an inappropriate manner or to persons who were not qualified to receive them.